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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

IN THE MATTER OF:

Environmental Protection Agency,
Complainant,

v.

Pacific Wood Treating Corporation,
EPA ID No. WAD009036906,

Respondent.

No. RCRA-1085-09-26-3008P

MEMORANDUM IN SUPPORT OF
RESPONSE IN OPPOSITION

INTRODUCTION

This is a case about one of the most fundamental elements of the "cradle to grave" regulatory scheme mandated by Congress for the control of dangerous waste under the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901 et seq. ("RCRA"). It is an enforcement action pursuant to Section 3008(a) of RCRA to require the installation of a groundwater monitoring system at a landfill used for the disposal of listed dangerous waste. This basic and fundamental requirement for land disposal units under RCRA has been virtually ignored at the RBT landfill, which is owned and operated by Respondent Pacific Wood

1 Treatment Corporation ("PWT"). This action seeks to remedy that
2 situation.

3 Groundwater monitoring requirements under RCRA are designed
4 to provide for the early detection of any dangerous waste
5 contamination to aquifers below regulated land disposal units
6 such as the RBT landfill. Those requirements mandate the
7 installation of at least four groundwater monitoring wells in the
8 uppermost aquifer, such that contamination of the groundwater can
9 be immediately detected. At the present time, an inadequate,
10 make shift system, in which the only aquifer wells utilized are
11 domestic wells located some distance from the RBT landfill, is in
12 place. This system is not even remotely in compliance with
13 applicable standards, and cannot adequately protect the aquifer
14 used by PWT's neighbors for potable water.

15 The State of Washington Department of Ecology ("DOE")
16 acted improperly in approving this system, which does not meet
17 its own regulatory requirements. Accordingly, EPA was forced to
18 take this action, as it is authorized to do under section 3008(a)
19 of RCRA, and enforce the state's own regulations. This is an
20 appropriate oversight action for the correction of major deficiencies
21 in state approved dangerous waste activities, in complete accordance
22 with the dual enforcement scheme envisioned by Congress when it
23 enacted RCRA. It is an action to ensure that basic and fundamental
24 requirements of the RCRA scheme are fulfilled. It is an action to
25 protect the invaluable resource of groundwater from contamination
26 by dangerous waste. It is an action which should not be dismissed
27 by the Court.
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2 I. STATUTORY AND REGULATORY FRAMEWORK

3 The Respondent has provided an accurate description of the
4 complex RCRA regulatory scheme. However, two additional aspects
5 of the program are relevant to this action.

6 The authorization of a state program to operate in lieu of
7 the federal RCRA program is provided for in section 3006 of RCRA.
8 That authorization was achieved by the State of Washington shortly
9 after the discovery of the RBT landfill, and shortly before the
10 issuance of a DOE Order which approved of the closure plan in
11 question. However, the presence of an authorized program is not
12 a bar to EPA involvement with activities regarding dangerous waste^{1/}
13 in the state. Section 3008 of RCRA is explicit in stating that
14 EPA can take enforcement action under that section in an authorized
15 state, upon a determination that applicable regulations or
16 standards are being violated. This dual enforcement scheme was
17 specifically referenced by Congress in legislative history which
18 accompanied RCRA, and is common in other environmental laws
19 administered by EPA. The scope of EPA's enforcement powers in an
20 authorized state is discussed in detail in section III.B. of this
21 Memorandum.

22 Secondly, in November of 1984, the President signed the
23 Hazardous and Solid Waste Amendments of 1984, which contain
24 several new requirements for owners and operators of dangerous
25 waste management units such as PWT. Those new provisions are to
26 be administered directly by EPA until such time as an authorized
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28 1. The State of Washington identifies regulated substances as
dangerous waste rather than hazardous waste. WAC 173-303-010.

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2 state amends its program to include the new requirements. 42
3 U.S.C. §6926(g). One provision of the amendments is directly
4 applicable to the RBT landfill. In section 3005(i) of RCRA, 42
5 U.S.C. §6925(i), Congress directed that standards applicable to
6 new landfills (i.e., 40 CFR Part 264 under the federal scheme)
7 for groundwater monitoring are applicable to any landfill which
8 received dangerous waste after July 26, 1982, without regard to
9 prior closure activities at that landfill. Prior to this time,
10 those requirements were applicable only to regulated which received
11 waste after January 26, 1983. See, 40 CFR §270.1. Because PWT
12 disposed of dangerous waste at the landfill until sometime in
13 January of 1983, these groundwater monitoring requirements are
14 applicable to the landfill. EPA has requested a Part B permit
15 application for the RBT landfill from PWT to address this
16 requirement, but PWT has refused to comply with this request.

17 Of course, until the part B permit is issued by EPA for
18 these new requirements, the interim status standards set forth in
19 Washington Administrative Code 173-303-400 (which incorporates 40
20 CFR Part 265 Subpart F verbatim) are applicable to the site, as
21 discussed in section III.A. of this memorandum. It is those
22 standards which are the subject of this enforcement action.
23

24 II. STATEMENT OF FACTS

25 The following facts are additions or corrections to the
26 Respondent's Factual Background statement.

27 1. PWT produces a bottom sediment sludge from a wood
28 treating process, which utilizes pentachlorophenol and creosote.

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2 The sludge is a listed hazardous waste under WAC regulations and
3 RCRA regulations. WAC 173-303-010; 40 CFR §261.32. The sludge
4 is listed because of its toxic properties. The preamble to
5 section 261.32 addresses the basis for its listing. At 45 FR
6 33113, May 19, 1980, it states

7 For hazardous wastes listed because they meet
8 the criteria of toxicity, the discussion of the
9 basis for listing identifies the waste constituents
10 of concern, whether these constituents are
11 present in significant concentrations, and the hazards
12 associated with each waste constituent. The
13 discussion then addresses whether these waste
14 constituents, if the waste is managed improperly,
15 could migrate from waste management sites,
16 persist in the environment and reach environmental
17 receptors so as to cause substantial hazard.
18 The analysis generally follows a physical
19 continuum whether waste constituents are inherently
20 capable of migrating from the matrix of the
21 waste in concentrations sufficient to cause
22 substantial hazard, whether waste mismanagement
23 could lead to environmental release of the
24 migrating waste constituents, and whether waste
25 constituents are mobile and persistent enough
26 to reach environmental receptors and cause
27 substantial hazard upon environmental release.
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18 It is only after this rigorous analysis was satisfied that
19 PWT's refuse was listed. The listing document for this waste is
20 available to the Court. The K001 waste generated by PWT is a
21 dangerous waste deserving of its name.

22 2. Residue from the burning of this sludge is also a
23 dangerous waste, pursuant to WAC 173-303-010, which incorporates
24 40 CFR §261.3(c)(2)(i). The rationale for this rule is simple.
25 Burning dangerous waste often results in the concentration and/or
26 alteration of the substance, such that more harmful substances
27 result. Any claim by PWT that its ash refuse contains only certain
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1 percentages of sludge constituents is pure speculation, and not
2 supported by analysis or data.

3
4 3. As the Respondent admits on pp. 5-6 of its memorandum,
5 the disposal of this ash by PWT at a nearby abandoned pit
6 (hereinafter "the RBT site" or "the RBT landfill") from 1978 to
7 early 1983 was a regulated activity pursuant to RCRA and the
8 Revised Code of Washington ch. 170, and produced a landfill as
9 that term is defined by applicable regulations. The Part A permit
10 application originally filed by PWT did not adequately identify
11 this landfill. Egber's affidavit, p. 3.

12 4. When EPA RCRA enforcement personnel learned of the RBT
13 site in January of 1983, they requested a separate part A permit
14 application for the landfill, in accordance with the regulations.
15 Stamnes affidavit, p.2. PWT responded with a part A permit
16 application for the landfill. That application is Exhibit 1 to
17 this memorandum. The application stated that the RBT site was a
18 landfill used for the disposal of dangerous waste. Ex. 1, p.3.
19 PWT estimated that between 190 and 240 tons of the ash refuse was
20 placed in the landfill. Ex. 1, p. 7. It noted that the ash was
21 additionally contaminated with arsenic, code no. D004. Id.

22 5. Shortly after this submittal, the State of Washington
23 received interim authorization for its dangerous waste program,
24 pursuant to section 3006 of RCRA. The program contained standards
25 for interim status facilities, substantially similar to 40 CFR
26 Part 265. 48 FR 34954, August 2, 1983. Because of this, EPA
27 deferred action on the RBT site to the State of Washington.
28 Brown affidavit, p. 2.

1 6. EPA did attend some, but not all, of the meetings
2 between DOE and PWT regarding the closure of the RBT landfill.
3 EPA's major review of the closure plan proposed by PWT was
4 contained in a letter drafted by Michael Brown, then EPA compliance
5 officer assigned to this site, and signed by Kenneth Feigner, EPA
6 Region 10 Branch Chief, Hazardous Waste Management Division. The
7 letter is Exhibit 2. That letter was addressed and sent to DOE,
8 not to PWT. The letter clearly identified relevant Part 265
9 standards which were and are applicable to the RBT landfill.
10 Provisions of subpart F were identified as some of those applicable
11 regulations.

12 7. At no time did EPA personnel approve of the Final
13 Closure Plan submitted by PWT and approved by DOE, either verbally
14 or in writing. Although EPA asserted that the RBT site did not
15 achieve interim status, it did not agree with DOE, either verbally
16 or in writing, that the interim status standards did not apply to
17 the site. Brown affidavit, pp.2-3; Stamnes affidavit, pp. 5-8.
18 Final meetings on the plan did not include EPA personnel.
19 Ceretified statement of Pat Wicks (Exhibit 6 to Respondent's
20 memorandum), pp. 1-2; Egber's affidavit, pp. 6-7.

21 8. EPA inspections at the site occurred on June 12, 1984,
22 and April 30, 1985. Brown Affidavit, p.3 and attachments;
23 Stamnes affidavit, p.4 and attachments. Those inspections
24 consistently identified lack of compliance by PWT at the RBT
25 landfill, due to an inadequate groundwater monitoring system.
26 The system used lysimeters, which were not located in the uppermost
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2 aquifer and which were not reliable. Domestic wells located in
3 the uppermost aquifer were also part of the system, but these
4 wells were a substantial distance from the site, and were not
5 capable of immediately detecting contamination. They were also
6 not reliable for monitoring. Wolf affidavit, pp. 3-8. Even
7 worse, the system could not (and cannot) address any releases
8 from the landfill which may have occurred prior to the installation
9 of the present system, except through the monitoring of the
10 neighbor's wells. If contamination was found in these wells,
11 the system will fail in its primary purpose. Wolf affidavit, pp.
12 7-8.

13
14 9. PWT has refused to address this problem through the
15 submittal of a Part B permit application to address groundwater
16 and financial assurance deficiencies, despite recently enacted
17 provisions of RCRA at Section 3005(i). EPA's request for a part
18 B permit application is Exhibit 3. PWT's response is Exhibit 4.

19 III. ARGUMENT

20 A. The applicable standard by which this closure
21 should be judged is the interim status standards
22 found at WAC 173-303-400 (which incorporates 40
CFR Part 265 subpart F).

23 1. Regulatory framework.

24 Respondent admits that the waste at the RBT landfill is
25 dangerous waste, and that the respondent has submitted a part A
26 permit application for the facility. Nevertheless, the Respondent
27 continually asserts that some amorphous standard outside the
28 regulations governing existing dangerous waste management units

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2 should be the Court's guide in evaluating the RBT site. This
3 assertion runs directly contrary to state regulations which were
4 applicable at the time of the closure, and to current interpretations
5 of both state and federal regulations.

6 Washington's regulations governing the disposal of dangerous
7 waste became effective on the date of interim authorization,
8 August 2, 1983. Section 173-303-400(2) of those regulations
9 addresses the applicability of interim status standards in the
10 State of Washington. The 1983 version of that section states

11 The interim status standards apply to owners and
12 operators of facilities which treat, store, transfer
13 and/or dispose of dangerous waste.

14 WAC 173-303-400(2)(a) (1983).

15 The regulations then go on to directly incorporate 40 CFR Part
16 265 subpart F as part of the interim status regulations.

17 PWT was the owner and operator of a facility which disposed
18 of dangerous waste on the date these regulations became effective,
19 and on the dates of the closure activities performed at the RBT
20 site. The plain language of section 400 makes those regulations
21 applicable to the RBT site.

22 If there is any doubt as to the applicability of these
23 standards to the RBT site, an EPA clarification issued on November
24 22, 1983 and effective on December 22, 1983 resolves that doubt.
25 As stated in the preamble to language changes to 40 CFR §265.1,
26 interim status standards, including subpart F requirements, apply
27 to all facilities in which hazardous (dangerous) waste was managed
28 and which were in existence on November 19, 1980, whether or not

1 position was maintained in the subsequent inspections at the
2 site. PWT and DOE should not have been misled in any way in the
3 face of this consistent written position by EPA. PWT has nothing
4 written from EPA to it approving, concurring in, or blessing in any
5 manner the RBT closure. Estoppel should not apply under those
6 circumstances. Heckler, supra, 104 S. Ct. at 2224-5; TRW Inc. v.
7 Federal Trade Commission, 647 F.2d 942 (9th Cir. 1981).

8
9 Other cases have emphasized the balancing of public policy
10 interests against the interest of the claiming party, in any case
11 asserting estoppel against the government. E.g., Deltona Corp.
12 v. Alexander, 682 F.2d 888 (11th Cir. 1982) (government's denial
13 of a permit upheld despite explicit prior statements to the
14 contrary and involvement by federal agents in state permit
15 proceedings, because of the important public policy evident in
16 the permit requirements regarding natural resources); Utah Power
17 and Light Co. v. United States, 243 U.S. 389 (1917) (public policy
18 regarding protection of water resources overrode any concerns
19 raised by past governmental conduct, despite explicit statements
20 by governmental agents and substantial expenditures by the private
21 party). The public policy inherent in groundwater regulations at
22 issue here should be found to be paramount to any of PWT's
23 concerns. The people who live near the RBT landfill and who rely
24 on the underlying aquifer should be the primary focus of this
25 Court.

26 As the Heckler court stated

27 There is simply no requirement that the Government
28 anticipate every problem that may arise in the
administration of a complex program such as Medicare,

1 neither can it be expected to ensure that every bit of
2 informal advice given by its agents in the course of
3 such a program will be sufficiently reliable to justify
4 expenditure of sums of money as substantial as those
5 spent by respondent.

6 104 S. Ct. at 2226.

7 The complicated RCRA scheme should figure into this case as well.
8 Even assuming PWT's version of the facts surrounding EPA's
9 involvement with the closure, which EPA strongly denies, estoppel
10 under the Heckler principles cannot be found. "Men must turn
11 square corners when they deal with the Government." Rock Island,
12 A. & L. R. Co. v. United States, 254 U.S. 141 (1920). In the
13 closure of the RBT landfill, square corners were not turned.
14 This enforcement action is intended to rectify those badly rounded
15 edges at the RBT site.

16 IV. CONCLUSION

17 Contrary to the Respondent's contention, EPA Region 10 is
18 willing to abide by the RCRA scheme mandated by Congress, including
19 the provisions which address authorized state programs. Part of
20 that scheme is the power to correct major deficiencies in state
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2 those facilities complied with all the requirements of section 3005(e)
3 of RCRA. 48 FR pp. 52719-21, November 22, 1983. EPA emphasized
4 that this clarification and language change was merely an
5 affirmation of existing regulatory authority, and not a change in
6 that authority.

7 The rationale for this clarification is logical. Existing
8 hazardous waste facilities which did not comply with interim
9 status standards should not be treated with less care or scrutiny
10 than those that did. Any kind of application of lesser standard
11 applied to these non-complying facilities would be manifestly
12 unfair and environmentally unsound.

13 Thus, 40 CFR §265.1(b) was amended to read

14
15 The standards of this part apply to owners and
16 operators of facilities that treat, store or dispose
17 of hazardous waste who have fully complied with the
18 requirements for interim status under Section 3005(e)
19 of RCRA and 270.10 of this chapter until either a
20 permit is issued under Section of 3005 of RCRA or
21 until applicable Part 265 standards are fulfilled,
22 and to those owners and operators of facilities in
23 existence on November 19, 1980 who failed to provide
24 timely notification as required by Section 3010(a)
25 of RCRA and/or failed to file Part A of the permit
26 application as required by 40 CFR 270.10 (e) and (g).

27
28 Emphasis added. That language stands today. 40 CFR §265.1(b)
(1986).

29 The state of Washington's section 400 language was different
30 from section 265's language, such that adding clarifying language
31 was not necessary. That language stands today, and is clear in
32 its application to all facilities which dispose of dangerous
33 waste which were in existence on the date those regulations went

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2 into effect.

3 2. Statements in one letter EPA Region 10 to DOE should not be
4 held to estop EPA's assertion of the proper standards for the landfill..

5 A letter from EPA to the DOE concerning the RBT
6 landfill was issued on August 10, 1983. That letter is Exhibit 2
7 to this document. To the knowledge of any EPA employee, that
8 letter was not provided to PWT until a FOIA request from their
9 attorney was received approximately three months ago.

10 That letter states, "(t)he disposal site did not qualify
11 for interim status and therefore cannot legally be closed as an
12 interim status facility." This merely represents EPA's view that
13 the facility had not complied with the full requirements of
14 section 3005(e) of RCRA. EPA then stated that any closure of the
15 facility must contain measures which were "equivalent to the
16 interim status closure and post closure requirements . . ."
17 This section of the letter is repeatedly quoted by the Respondent
18 to assert that the closure should not be evaluated by subpart F
19 standards.

20 Parts of the letter which the Respondent does not quote go
21 on to specifically site part 265 standards which were applicable
22 to the site. On page 2 of the letter, it states that "PWT needs
23 to design a GW monitoring system that is consistent with 40 CFR
24 265 Subpart F standards but which considers that this site will
25 be closed." The comments go on to describe very specific
26 requirements for the closure under specific references to Part
27 265 standards. It is those same standards which are addressed by
28 the current Complaint and Compliance Order.

1 Respondent ignores this part of the comment letter, and
2 instead argues for the application of some vague standard of
3 lesser proportions. Indeed, Respondent seems to want it both
4 ways when it states
5

6 (T)he relevant inquiry is whether the DOE enforcement action
7 with respect to the matters covered by these Part 265
8 regulations was reasonable and appropriate, recognizing
that neither EPA nor DOE required strict compliance with
Part 265.

9 Respondent's Memorandum p. 20. Emphasis added.

10 EPA's position, as evidenced by the November 22, 1983
11 clarification and by the clear references to part 265 regulations
12 in the August 10 comment letter, has been and is that the closure
13 of the RBT site must be done in strict compliance with WAC 173-
14 303-400, which incorporates 40 CFR part 265 subpart F.

15 Respondent does not address how this letter precludes EPA
16 from siting the appropriate standards for evaluation of the
17 closure at this point. In his affidavit, Eric Egbers misstates
18 EPA's August 10 position badly, and then makes no reference to
19 the communication of EPA's position to PWT by DOE or EPA. Egber's
20 affidavit, p. 6. Nevertheless, Respondent makes sweeping claims
21 in its memorandum that somehow PWT was assured by EPA that the
22 Part 265 standards would not apply to the RBT closure. No such
23 assurances, comments, or inferences were ever given to PWT by
24 EPA. There is no basis to argue that clearly applicable regulations
25 did not and do not apply to this closure, except for the mistaken
26 interpretation of regulations given to PWT by DOE. It is that
27 mistaken interpretation which this enforcement action is designed
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2 to correct, in accordance with the oversight function given to EPA
3 in the RCRA statutory scheme.

4 The requirements of estoppel against the government are
5 discussed in detail in section III.C of this memorandum. The
6 doctrine should not apply to this particular issue because a.)
7 EPA personnel did not state that interim status standards did not
8 apply to this facility, b.) no written communication exists
9 between EPA and PWT which contains this communication, and c.)
10 public policy considerations in the application of proper standards
11 to so important an activity as closure of a hazardous waste site
12 outweigh any burden on the Respondent in this matter. See,
13 Heckler v. Community Health Services, ___ U.S. ___, 104 S. Ct.
14 2218, 2224-6 (1984); Utah Power & Light Co. v. United States, 243
15 U.S. 389 (1917); TRW Inc. v. Federal Trade Commission, 647 F.2d
16 942, 945-7 (9th Cir. 1981).

17 EPA's position was and is that his closure must meet the
18 applicable requirements of 40 CFR Part Subpart F, at a bare
19 minimum. That position is backed by the current language of 40
20 CFR §265.1(b) and the plain language of WAC 173-303-400(2), and
21 the August 10 letter. Any statements to the contrary by former
22 DOE staff level persons, or any belief to the contrary by PWT
23 were simply incorrect.

24 B. An overfile enforcement action by EPA is not barred by
25 the state's prior regulatory order.

26 1. Section 3008(a) permits EPA enforcement in an authorized
27 state without regard to prior state action.

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2 Despite the decision by the Administrator of EPA to vacate
3 two prior rulings in the BKK Corporation case, and to accord no
4 precedential value to those prior rulings, Order on Petition for
5 Reconsideration, In the Matter of BKK Corporation, No RCRA (3008)
6 84-5 (October 23, 1985), the Respondent continues to rely on
7 those prior rulings to argue for dismissal of this case. As the
8 Administrator's Order and subsequent guidance issued by A. James
9 Barnes, Deputy Administrator of EPA, indicate, the rationale used
10 in those prior rulings should not be used in overfiling cases
11 pursuant to section 3008(a)(1) of RCRA.

12 Section 3008(a) authorizes the Administrator to take an
13 enforcement action pursuant to that section whenever he determines
14 that anyone has violated a Subtitle C requirement^{2/}, except as
15 provided in Section 3008(a)(2). That section states

16
17 In the case of a violation of any requirement of this
18 subchapter where such violation occurs in a State which
19 is authorized to carry out a hazardous waste program
20 under section 6926 of this title, the Administrator
shall give notice to the State in which such violation
has occurred prior to issuing an order or commencing
a civil action under this section.

21 Thus, the only limitations or prerequisites to an enforcement
22 action by EPA in an authorized state are:

23 a.) a finding that a violation of the state program or
24 federal regulations has occurred, and

25 b.) notice to the state of EPA's intent to take enforcement
26 action addressing those violations.

27 2./ In a state which has received authorization, the requirements
28 of an authorized state program are considered Subtitle C
requirements. Section 3006(b). EPA takes the position that
federal regulations are also applicable. Section 3008(a)(2).

1 No other limitations are permissible under section 3008(a).

2
3 Section 3006, the provision which addresses authorized
4 state programs, is not relevant to Section 3008 authority. EPA
5 agrees with the Respondent that the authorized program in place
6 at the time of the closure activities at the RBT site and at
7 present operates in lieu of the federal program. This simply
8 means that state standards are applicable and state issued permits
9 are done instead of EPA issued permits. This does not mean that
10 any extra limitation or prerequisites on Section 3008(a) enforcement
11 power can be or should be found, as a matter of law. Congress,
12 which paid considerable attention to enforcement power under the
13 statute, would not have buried such limitations as the Respondent
14 urges in so vague of terms as that. Instead, it would have made
15 such limitations explicit, as it did in Section 1423 of the Safe
16 Drinking Water Act or Section 402(h) of the Clean Water Act. No
17 such explicit limitations are found here, and none should be read
18 into this statutory scheme.

19 The full discussion of this issue, including relevant
20 statutory language, legislative history, and case law, is addressed
21 in the decision of the Office of General Counsel dated May 9,
22 1986, which is incorporated herein by reference. That decision
23 and an accompanying guidance memorandum is attached as Exhibit 5
24 to this document.

25 Complainant's position is that no limitation should be
26 placed upon EPA's clear statutory authority under section 3008(a),
27 other than those limitations made explicit in the language of
28 section 3008(a). That position is supported by the Administrator's

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2 October 23 order in BKK, which does emphasize that the case is
3 not to be given precedential value. Any "non-decisional" aspects
4 of that Order have been eliminated by the guidance memorandum
5 issued by Deputy Administrator Barnes. Those statements should
6 be taken seriously, and the reasoning of In re Martin Electronics
7 Inc. should be rejected.

8 A copy of the notice to the State of Washington on this
9 matter is provided as Exhibit 6 to this document. Allegations of
10 violations of relevant state and federal regulations are supported
11 by the affidavits attached hereto and their accompanying attachments.
12 There is no grounds to dismiss this action under section 3008(a).

13 2. Even if prior BKK decisions are found to apply, the State of
14 Washington's actions are inappropriate under any standard in
15 this action, and EPA enforcement action is not now barred.

16 The superseded BKK decisions established that EPA did have
17 the authority to take enforcement actions in authorized states,
18 but only if the state had not taken action, or had taken action
19 which was not reasonable, appropriate or timely. This corresponds
20 with EPA guidance documents referenced in Deputy Administrator
21 Barnes memorandum.

22 The closure and post closure system approved by DOE for
23 the RBT site was not reasonable and appropriate, in any kind of
24 environmental sense. Its groundwater monitoring system utilizes
25 lysimeters and surrounding domestic water wells. The lysimeters
26 are located in the unsaturated zone soil column above the uppermost
27 aquifer. Their construction is susceptible to producing incorrect
28 analysis and data. They are susceptible to clogging by sand or soil.

1 The domestic wells are also not constructed like groundwater
2 monitoring wells, and do not contain appropriate screening and
3 packing to ensure reliable sampling and testing. Even more
4 shocking is the fact that these wells are some distance from the
5 RBT landfill and cannot immediately detect a release from the
6 landfill. Thus, the wells and water supplies which a RCRA
7 groundwater monitoring system are designed to protect are used by
8 PWT as guniea pigs to show contamination after the problem has
9 gotten out of hand. This is inappropriate, unacceptable, and
10 unreasonable. Even more notable, the system has no mechanism to
11 detect releases which may have occurred prior to the installation
12 of the current system. This very basic failure cannot be ignored
13 by EPA or by this court.

14 What distinguishes this case from the facts of BKK or
15 Martin Electronics is the failure of PWT to even remotely address
16 the environmental problems at issue. In BKK and Martin Electronics,
17 the respondents' had taken significant actions to achieve compliance
18 with RCRA regulations. The system in place at RBT is not even
19 remotely in compliance with subpart F standards. Instead of
20 addressing compliance with standards for the groundwater monitoring
21 system, PWT argues that these standards are not applicable, and
22 then make illusory statements concerning the adequacy of the
23 current system. A hazardous waste landfill without monitoring
24 wells in the aquifer directly beneath it is not adequate, and
25 should not be considered appropriate by this court.

26 This case is much more similar to Environmental Protection
27 Agency v. Cyclops Corp., RCRA No. V-W-85-R-002, where state action
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2 had produced blatant and obvious deviations from regulatory norms
3 at the regulated facility. Groundwater contamination by hazardous
4 waste is one of the most crucial environmental concerns of the
5 present day. Congress make its concern on this issue known when
6 it enacted the 1984 amendments to RCRA, which primarily addressed
7 groundwater requirements and protection at regulated facilities.
8 Subpart F of the Part 265 regulations is central in this effort
9 to address this concern. A system which does not even come close
10 to compliance with those regulations cannot be deemed appropriate
11 or adequate. The DOE was simply wrong in approving this system,
12 perhaps out of inexperience with a brand new program. It is
13 entirely appropriate for EPA to step in and correct these obvious
14 deficiencies, just as Congress provided for in section 3008.

15 C. EPA is not estopped from bringing this action
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17 As the Respondent admits, estoppel cannot be asserted
18 against the government on the same terms as against private
19 litigants. The Supreme Court has recently ruled that estoppel
20 against the government can be applied in only the most narrow of
21 circumstances. Heckler v. Community Health Services of Crawford,
22 __ U.S. __, 104 S. Ct. 2218 (1984). Those narrow, extreme
23 circumstances are not present here.

24 EPA did participate in some, but not all of the technical
25 discussions regarding the RBT landfill closure. It consistently
26 maintained that a groundwater monitoring system in compliance
27 with subpart F must be installed at the site. This central
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1 action, to ensure the uniform and proper application of RCRA
2 regulations on a nationwide basis. Respondent must also abide by
3 that program, and provide for the most basic protection from
4 hazards to the public from its dangerous waste activities. For
5 the reasons state above, the Respondent's motion should be denied.
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8 Respectfully submitted this 20 day of June, 1986.
9

10 D. Henry Elsen
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12 D. Henry Elsen
13 Assistant Regional Counsel
14 EPA Region 10
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